Place of Meeting
State Bar Building
601 McAllister St.
San Francisco

AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

San Francisco

Friday and Saturday
August 18 and 19

1. Minutes of July 1961 meeting (sent)

2. Set time and place for October, November and December meetings.

3. Administrative matters

Memorandum No. 24(1961) (Proposed Budget for 1962-63 Fiscal Year) (sent August 4, 1961)

4. Study No. 36(L) - Condemnation

Memorandum No. 25(1961) (Pretrial Conferences and Discovery) (sent August 4, 1961)

First Supplement to Memorandum No. 25(1961) (Recent California Supreme Court discovery case) (to be sent)

Memorandum No. 36(1961) (Letter from Department of Public Works) (enclosed)

Memorandum No. 26(1961) (Senate Bill No. 205 - Evidence) (sent August 4, 1961)

Memorandum No. 27 (1961) (Senate Bill No. 203 - Moving Expenses) (sent August 4, 1961)

5. Study No. 34(L) - Uniform Rules of Evidence

Hearsay Evidence:

Memorandum No. 28(1961) (Tentative Recommendation on Hearsay) (sent August 10, 1961)

Privileged Evidence:

Memorandum No. 18(1961) (Rules 23-25) (sent June 7, 1961)

Memorandum No. 20(1961) (Rule 26) (sent June 12, 1961)

Memorandum No. 21(1961) (Rule 27) (sent June 12, 1961)

First Supplement to Memorandum No. 21 (1961) (Rule 27) (enclosed)

Memorandum No. 29(1961) (Rule 27A - Psychotherapist Privilege) (sent August 4, 1961)

Memorandum No. 30(1961) (Rule 28) (enclosed)

Memorandum No. 31(1961) (Rule 29) (enclosed)

Memorandum No. 32(1961) (Rules 30, 31 and 32) (enclosed)

Memorandum No. 33(1961) (Rules 33, 34 and 35) (enclosed)

Memorandum No. 34(1961) (Rule 36) (enclosed)

MINUTES OF MEETING

of

August 18 and 19, 1961

San Francisco

A regular meeting of the Law Revision Commission was held in San Francisco on August 18 and 19, 1961.

Present: John R. McDonough, Jr., Vice Chairman
Honorable Clark L. Bradley
Honorable James A. Cobey (August 18)
James R. Edwards
Sho Sato
Vaino H. Spencer
Thomas E. Stanton, Jr.

Absent: Herman F. Selvin, Chairman
Josseph A. Ball
Ralph N. Kleps, ex officio

Messrs. John H. DeMoully, Joseph B. Harvey and Jon D. Smock of the Commission's staff were also present.

Mr. Stanley Tobin was present for a portion of the meeting of August 18, during the discussion of Study No. 36(L) - Condemnation. Also attending during this discussion were Messrs. Holloway Jones, Robert Carlson and Norval Fairman from the California Department of Public Works

Professor James A. Chadbourn was present for a portion of the meeting on August 19, during the discussion of the Hearsay Article of the Uniform Rules of Evidence.

The Minutes of the meeting of July 21 and 22, were corrected as follows:

On page 12, line 2, "comment" was substituted for "subdivision".

On page 17, first line under the heading "Section 2 (Section 1246.1)," the colon at the end of the line was deleted.

The Minutes were approved as corrected.

I. ADMINISTRATIVE MATTERS

A. Proposed Budget for 1962-63 Fiscal Year. The Commission considered Memorandum No. 24(1961) containing a proposed budget for the 1962-63 fiscal year. The amount proposed to be expended for "Printing and Binding" for the 1962-63 fiscal year was reduced to $6,000 and the amount for "Travel, in-state" was increased to $8,000. Upon motion by Mr. Edwards, seconded by Mr. Stanton, the proposed budget as so revised was approved.

B. Addendum to Stanford Research Contract. The Commission considered a staff recommendation that the existing research contract with Stanford University be revised to increase the amount available for expenditure from $5,000 to $7,500. It was noted that $7,500 is budgeted for this purpose. However, the Commission previously [May 1961] deferred encumbering $2,500 of this amount because of the possibility that this sum might be needed to finance the renegotiation of certain other research contracts. Most of these other contracts have been renegotiated.

A motion was made by Mr. Sato, seconded by Mr. Edwards and unanimously adopted that the amount available for expenditure under the Stanford research contract be increased to $7,500 and that the Chairman be authorized and directed to execute the necessary addendum to the Stanford research contract to effectuate this motion.

C. Authority of Vice Chairman to Approve Claims. A motion was made by Mr. Stanton, seconded by Mrs. Spencer and unanimously adopted that the Vice Chairman also be authorized to approve claims. The Executive Secretary was directed to take the necessary action to accomplish this objective.

D. Commission Procedure. A motion was made by Mr. Edwards, seconded by Mrs. Spencer and unanimously adopted that the staff draft a statement of policy for consideration by the Commission to state that an action taken by the affirmative votes of five Commissioners can be changed only by the affirmative votes of five Commissioners. It was noted that this might require that the Minutes reflect the members voting for and against a motion when the vote is not unanimous.

E. Future Meetings. The following dates and places were tentatively set for future meetings of the Commission:

October 20 and 21 (Los Angeles)

November 10 and 11 (San Francisco)

December 15 and 16 (Los Angeles)

II. CURRENT STUDIES

Study No. 34(L) - Uniform Rules of Evidence

The Commission considered Memorandum No. 28 (1961), the tentative recommendation on the Hearsay Article of the Uniform Rules of Evidence.

The following actions were taken. Page references are to the tentative recommendation -- (yellow pages).

Page 3. The addition of footnote 3 was approved. A paragraph is to be added following the single spaced material at the top of page 3, to read substantially as follows:

> It should be noted that the exceptions to the hearsay rule that are set forth in the subdivisions of Rule 63 do not declare that the evidence described is necessarily admissible. They merely declare that such evidence is not inadmissible under the hearsay rule. If there is some other rule of law -- such as relevance or privilege -- which makes the evidence inadmissible, the court is not authorized to admit the evidence merely because it falls within an exception to the hearsay rule.

Page 6. Paragraphs (c) and (d) of subdivision (6) were revised to read as follows:

> (c) Dead or unable to attend or testify at the hearing because of age, sickness, infirmity or imprisonment.
> (d) Absent beyond the jurisdiction of the court to compel appearance by its process.

The effect of these changes is to conform Rule 62(6) to the 1957 discovery statute.

The staff is to submit its recommendation on a possible revision of paragraph (e) of subdivision (6). The revised URE paragraph requires

"reasonable diligence" to be exercised but it is not clear that the comparable provision in the 1957 discovery statute imposes a similar requirement.

Page 7. Subdivisions (8) and (9) as proposed by the staff are to be revised so that they apply (a) to depositions taken in another action or proceeding and (b) to former testimony in another action or proceeding or in a former trial of the same action or proceeding.

The comment to Rule 62 is to be revised to conform to the changes made above.

Page 9. "Rule 63" was substituted for "Rule 62" in the second line.

So much of the footnote that appears on page 9 was revised to read in substance as follows:

> entitled to claim it for him, in order to be operative. Hence, under Rule 62, it will be necessary for the privilege to be claimed and allowed in accordance with the pertinent rules before the court may find the declarant unavailable on that ground.

Page 18. In the second line of the underscored material, a parenthesis was inserted before "other" and in the fifth line of the underscored material a parenthesis was inserted after "time".

In the fourth line of the underscored material, the word "and" was substituted for "or".

In the first line of paragraph (a), the word "person" was substituted for "party".

Page 19. In the first line, the word "person" was substituted for "party".

In the eleventh line, after "paragraph" the phrase "against the

defendant" was inserted.

Page 20. The second and third sentences of the paragraph beginning about the middle of the page were revised to read substantially as follows:

> The Commission recommends that the first qualification be retained but that the second be modified in two respects: (1) to provide that in most cases when the testimony is offered against a party who was also a party to the former action or proceeding, any objection to the form of the question not made at the time the testimony was given is waived and (2) to make clear that the validity of objections based on competency or privilege is to be determined by reference to the time the former testimony was given.

It was noted that the confrontation provision of subdivision (3) is not discussed in the comment thereto and it was suggested that (when the comments to subdivisions (3) and (3.1) are revised) the comment under subdivision (3.1) be made applicable to subdivision (3) also.

Page 23. The proposed subdivision was renumbered as "3.1".

In line two, before "other" and in line three after "given" a parenthesis was inserted.

The last two lines of the comment were revised to read:

> should be compelled to rely on the opportunity that another person had to cross-examine.

It was suggested that the comment for subdivisions (3) and (3.1) appear under subdivision (3.1).

Page 36a. Proposed subdivision (9a) was disapproved. The staff called attention to the American Law Institute explanation for omitting this exception to the hearsay rule. (See page 3 of Memorandum No. 28(1961).)

Pages 37 and 38. Subdivision (10) and the comment thereto were approved as contained in the tentative recommendation.

Page 40. Paragraph (d) of subdivision (12) is to be renumbered as paragraph (b) and revised to permit showing of present memory of a prior state of mind to show the prior state of mind but not any other fact. Paragraph (b) was renumbered (c) and paragraph (c) was renumbered (d). The comment is to be revised to conform to these changes.

Page 47. The revised comment to subdivision (15) was approved.

Page 56. The third sentence of the comment was deleted. The staff was directed to check the cases applying this exception to determine what reason, if any, is given to justify it.

Page 62. This subdivision was renumbered as "(26.1)".

Page 66. This subdivision was revised to read substantially as follows:

> (29) A statement contained in:
> (a) A deed or conveyance or a will or other writing purporting to affect an interest in property, if the judge finds that (i) the matter stated was relevant to the purpose of the writing, (ii) the matter stated would be relevant upon an issue as to an interest in the property and (iii) the dealings with the property since the statement was made have not been inconsistent with the truth of the statement.
> (b) A writing more than 30 years old when the statement has been since generally acted upon as true by persons having an interest in the matter.

In the sixth line of the comment, after "document" the phrase "when related to the purpose of the document" was inserted.

Page 71. The comment was revised to read as follows:

> The Commission does not recommend the adoption of Rule 64. No such requirement of pretrial disclosure now exists. Modern discovery procedures provide the adverse parties adequate opportunity to protect themselves against surprise.

Page 75. Rule 66A was renumbered as "66.1".

Page 76. In the sixth line, the words "studied these statutes" were deleted and "considered whether these statutes should be repealed or amended" was inserted.

Page 77. It was suggested that a statement be added to the tentative recommendation to indicate that in many cases where it is hereafter stated that an existing statute is superseded by a provision of the URE, the URE provision replacing the existing statute may be broader or narrower than the existing statute. In these cases, the Commission believes that the proposed provision is a better rule although in a given case it may be broader or narrower than the existing law.

In the eighth line, the word "existence" was substituted for "validity".

At the end of footnote 8 at the bottom of the page, the words "and hence are admissible under Rule 7" was added.

Statutes amended and repealed. Except as hereafter noted, the Commission approved pages 78-90 of the tentative recommendation.

Page 78.

Section 1848. The comment is to be revised to indicate in substance the following: Insofar as this section deals with hearsay it is superseded by the opening paragraph of Rule 63 and the numerous exceptions thereto. But the section may have a broader application. If so, its meaning is not clear and its possible applications are undesirable so that there is no justification for retaining the section.

Section 1849. The comment is to be revised to conform to the comment set out on pages 2 and 3 of Memorandum No. 28(1961).

Section 1850. The words "and insofar as it covers nonhearsay, this is admissible by URE Rule 7" are to be added to the comment.

Page 79.

Section 1851. The repeal of this section was not approved. A decision was deferred pending a report from the staff on the cases arising under the section. It is to be considered in connection with subdivisions (9)(c) and (21) of Rule 63.

Page 81. The comment at the top of the page is to be deleted and the comment is to conform to the comment set out on pages 2 and 3 of Memorandum No. 28(1961).

Section 1870(7). The comment to this subdivision is to be conformed to the comment to Section 1850.

Page 83.

Section 1893. Action on this section was deferred pending a staff report on whether subdivision (17) of URE Rule 63 is broad enough to include all "public writings."

Section 1901. Action on this section was deferred pending a staff report on its relation to Rule 63(17): Is 63(17) broad enough to cover all "public writings"?

Page 85. The comment following Section 1919 should read in substance as follows:

> These sections relate to both hearsay and authentication. Insofar as they relate to hearsay, they are superseded by sub-

divisions (13), (17) and (19) of Rule 63 pertaining to the admissibility of governmental records and copies thereof. In its report on URE Article IX (Authentication and Content of Writings), the Commission will indicate the ultimate disposition of these sections.

Page 86.

Section 1921. The comment to this section should be similar to the comment following Section 1919.

Section 1926. Action on this section was deferred pending receipt of a report from the staff. For example, does this section create a presumption that an ordinance was duly enacted? What is the effect of the repeal of this section?

Page 87.

Section 1947. The comment to this section is to be revised to read substantially as follows:

> This section relates to both hearsay and the best evidence rule. Insofar as it relates to hearsay, it is superseded by the business records exception contained in Rule 63(13). The ultimate disposition of this section will be indicated in the Commission's recommendation on Rule 70 -- the URE best evidence rule.

Page 88. There was general agreement that Section 2016 should conform to the definition of "unavailable as a witness" in Rule 62, but the definition of "unavailable as a witness" in Rule 62 is to be revised (as previously indicated) to take into account what constitutes "unavailabe as a witness" under Section 2016.

Page 90. The third sentence of the comment to Section 2047 was revised to read:

> There is no reason to require the memorandum to meet the necessarily strict standards that a document purporting to contain recorded memory must meet, for when a witness's recollection is refreshed he testifies to present recollection rather than to the matter contained in the refreshing memorandum.

The amendment to Section 2047 was revised to insert "at the request of the adverse party" after the word "produced".

Pages 91-93. These pages were not considered by the Commission.

Study No. 36(L) - Condemnation

Pretrial Conferences and Discovery

The Commission considered Memorandum No. 25(1961) relating to pretrial conferences and discovery in eminent domain proceedings.

Consultation with Chief Justice. The Commission determined that the Chairman should consult the Chief Justice concerning this recommendation prior to the September meeting. The Chairman may designate the Vice Chairman to consult with the Chief Justice. No general distribution of the tentative recommendation is to be made until after the September meeting.

Tentative recommendation. The following changes were made in the text of the tentative recommendation.

The first paragraph was revised to read as follows:

> One of the major improvements in the procedural law of this State in recent years has been the enactment of adequate discovery legislation. Effective discovery techniques serve two desirable purposes. First, they enable a party to learn and to determine the reliability of the evidence that will be presented against him at the trial. Second, they make the pretrial conference more effective because each party has greater knowledge of what he can expect to prove and what the adverse party can be expected to prove against him.

(2) The following was substituted for the first three sentences of the second paragraph:

> The use of discovery in eminent domain proceedings has not kept pace with its use generally in civil proceedings. Prior to the decision of the California Supreme Court in Greyhound Corp. v. Superior Court in 1961, this was in part

attributable to such decisions as Rust v. Roberts,[2] which severely limited the extent to which the opinion of an expert could be discovered in an eminent domain case. These decisions made discovery ineffective because the principal issue involved in eminent domain litigation (the value of the property taken or damaged) is a matter of expert opinion. The extent to which the Greyhound case has made the opinion of the expert in an eminent domain case discoverable is not clear,[3] although in that case the Supreme Court cited Grand Lake Drive-In v. Superior Court[4] (holding that an expert's opinion may be discovered) with approval [5] and criticized Rust v. Roberts.[6]

The first part of the next sentence was revised in substance to read:

Even if the courts construe the Greyhound case to permit broad discovery in eminent domain cases, two major obstacles to the use of discovery in these cases will still exist. The first is the problem of the compensation . . .

In line 2 on page 2, "The other" was substituted for "A third".

It was suggested that the staff revise the two sentences contained on lines 9 through 15 on page 2.

In the next paragraph on page 2, the words "are provided by" were substituted in two places for "appear in" and the words "a copy of" were inserted for "the items in".

On page 3, line 5 was deleted and the following inserted: "the testimony of an examining physician at the trial if his report has not been exchanged."

In the second line of the next paragraph, "a party" was substituted for "the parties" and "his" was substituted for "their".

On page 3, line 13, following "have" at the beginning of the line, "had" was inserted.

The two sentences beginning on line 19 on page 3 were changed to read:

Second, if the exchange of information takes place prior to the pretrial conference, ~~it will permit the pretrial~~ the

conference ~~to~~ will serve a more useful function in eminent domain proceedings. For example, the parties, having checked the supporting data ~~prior-to-the-pretrial-conference~~ in advance, may be able to stipulate at the pretrial conference to the highest and best use, to what sales are comparable, to the admissibility of certain other evidence and, perhaps, even to the amounts of certain items of damage.

The words "amends the" were substituted for "develops" at the end of the third line from the bottom of page 3.

The first sentence of the footnote on page 4 was revised to read:

"The proposed statute requires that ~~the~~ a demand to exchange valuation information be served at least 40 days prior to trial and that ~~the~~ a statement of valuation ~~evidence~~ information be served at least 20 days prior to trial."

The substance of the following is to be added as a new paragraph after the first line on page 4:

The procedure recommended above for the pretrial exchange of valuation information is supplemental to other discovery procedures. Nevertheless, the Commission anticipates that the procedure herein recommended will provide all the information that is necessary in the ordinary case and that other methods of discovery will be used only in unusual cases.

Lines 2 and 3 on page 4 are to be reworded to allow for a joint discussion of recommendations and supporting arguments. It was suggested that the supporting argument for each of the following items might be set out in a separate paragraph to avoid confusion.

The recommendation is to be further revised to conform to the changes made in the proposed statute.

Proposed Statute. The following policy decisions were made with respect to the proposed statute:

(1) The sanction in Section 1246.3 is to be limited to a party's case in chief so that cross examination and rebuttal testimony are unaffected by the required exchange of valuation data. This change was made because

it is often difficult to anticipate the evidence required for proper rebuttal.

(2) A demand may be served only upon an "adverse party." This change will make it clear that where there are several parcels of property being taken in the same proceeding, the exchanges are to be only between persons interested in the same parcel of property.

(3) The word "evidence" is to be replaced by either "data" or "information" when describing the information required to be exchanged. Technically, data are not properly evidence until introduced as such in a judicial proceeding.

(4) Language similar to the descriptive language in Section 2031 of the Code of Civil Procedure -- "maps, plans, documents, photographs, motion pictures, models, objects and tangible things" -- is to be used in Section 1246.2(b)(6).

(5) A provision is to be added to the bill to place a duty upon the person serving and filing a statement of valuation information to make available at reasonable times for inspection and copying or photographing certain data, objects and tangible things in his possession, custody or control.

(6) Section 1247b was revised to delete all reference to the time of trial and insert instead an affirmative requirement that the map be delivered to the defendant not more than 15 days after a demand therefore.

(7) Paragraph (5) of Section 1246.2(c) is to be revised to indicate that a statement of the place and times when a contract or other document is available for inspection may be used in lieu of stating the terms of the document only if such terms are contained in the document.

Senate Bill No. 205

The Commission considered Memorandum No. 26(1961) concerning Senate Bill No. 205, the bill relating to evidence in eminent domain cases. The Commission took the following actions.

(1) Opinion of property owner. The Commission approved the amendment made to Section 1248.1 of the Code of Civil Procedure which (a) deleted the provision in the original bill that the owner of the property being condemned is "presumed to be qualified" to express opinions as to the value of the property and (b) added language to state that an opinion as to the value of the property may be expressed by the owner.

(2) Relevance. The Commission approved the revision of Section 1248.2 that inserted a requirement that the data relied upon by an appraiser be relevant to the item of value, damage or benefit concerning which the appraiser expresses his opinion.

(3) Noncompensable factors. The Commission approved Section 1248.3(f) which makes it clear that an opinion of value, damage or injury may not be based on noncompensable factors.

(4) Gross receipts leases. The Commission approved the provisions of the bill which permit an appraiser to consider a lease based on a percentage of gross receipts in determining the reasonable net rental value of the subject property (Subdivisions (c), (d) and (e) of Section 1248.2).

Under the amended bill (a) a gross receipts lease on the subject property may be considered by the appraiser in forming his opinion and (b)

in determining the reasonable rental value of the subject property where gross receipts leases are customarily used for that type of property, the appraiser may consider gross receipts leases on comparable property.

It is becoming the practice to prepare leases for commercial property on a gross receipts basis. If an appraiser is not permitted to consider gross receipts leases, his opinion will not reflect the practice in the market and as a result the owner will be deprived of evidence necessary to support his contentions as to the value of his property. Accordingly, the appraiser in these cases should not be restricted to leases that fix a flat rental fee but should be permitted to consider gross receipts leases as well.

The objection to the use of gross receipts leases is that such leases reflect to some extent the ability of the management of the tenant and are in effect profit sharing agreements. Nevertheless, the consultant pointed out that there is a trend in the law (California included) to permit an appraiser to consider gross receipts leases. In addition, appraisers who have analyzed this problem are in agreement that this evidence is necessary in order to form an accurate opinion of value and that any approach that excludes gross receipts leases would be unsatisfactory. Not only are gross receipts leases considered in valuing property in the market place but buyers and sellers in the market recognize that any good management can reach the anticipated volume of business at a particular location. Commissioner McDonough objected to the provision that limits the use of gross receipts leases to cases where rentals are customarily so fixed. He expressed the opinion that the appraiser should be permitted to consider

a gross receipts lease, whether or not gross receipts leases are customarily used for that type of property.

(5) Capitalization of hypothetical improvements. The Commission approved the provisions of the bill which permit an appraiser to consider (for the purpose of determining the value of the subject property by capitalizing its reasonable net rental value) both (1) the reasonable net rental value of the land and the existing improvements thereon and (2) the reasonable net rental value of the property if the land were improved by improvements that would enhance the value of the property for its highest and best use (Subdivision (e) of Section 1248.2). Commissioners Cobey, Edwards, Sato and Spencer voted for and Commissioners Bradley, McDonough and Stanton voted against the provision relating to the capitalization of hypothetical improvements.

Capitalization of the reasonable net rental value of the property (based on the assumption that the land is improved by improvements that would enhance the value of the property for its highest and best use) would be useful in any case where the land is unimproved or where existing improvements do not enhance the value of the property for its highest and best use. In these cases a capitalization of the reasonable net rental value of the land as unimproved or as improved with its uneconomical improvement would not be as useful as a capitalization study that also took into consideration the capitalization of the reasonable net rental value attributable to the land if it were improved by improvements that would enhance the value of the land for its highest and best use.

The consultant stated that this is one of the most important provisions in the bill if we are to keep up with the times. He made a statement which is summarized below:

> In a number of trials in which his firm has been engaged, this approach has been used and it will be used much more. For example, it is necessary to use this approach in a case where the existing structure is old or run down and the property is a perfect location for a motel. It is frequent to find a piece of property that is underimproved or that has an obsolete improvement. In these cases, a buyer and seller in the market place consider the use to which the property can be put. The buyer will determine that he wants the property because he assumes that if he puts up a motel on the property he will have so many units and, based on managerial and other costs, his investment will yield a certain amount. Subdivision land is often sold the same way: how many units can be put on the land and what income and costs will result?
>
> Most of the developments, at least in Southern California, use this kind of approach. Sometimes the approach is more refined, sometimes it is rather crude. But this approach does ascertain the amount that the property -- not in its present condition but as improved for its highest and best use -- will produce.
>
> It is true that this approach involves the capitalization of a hypothetical improvement but this is characteristic of a rapid growing area. It is the way property is bought and sold. Admittedly, this approach would offer a jury the greatest chance for speculation. Nevertheless, it is not only a prime consideration but perhaps the prime consideration taken into account by buyers and sellers in the market. Purchasers buy property on what it will bring in -- based on its highest and best use. This anticipated income is computed using a capitalization approach. Use of this approach is a necessary corollary to the valuation of property on the basis of its highest and best use.
>
> Some trial courts in California now permit the use of this approach. There are no appellate decisions in California. Most of the appellate decisions in other states do not permit this approach to be used.

The question may be asked: why not use comparable sales rather than capitalizing hypothetical improvements? The difficulty of using the comparable sales approach is that it is difficult to find really comparable sales of commercial property; property on one corner may be totally different from property in the same area on another corner. To find comparable sales it is necessary to go out on the periphery. Using sales that far from the subject property may make a substantial difference in the value of the property. We are not concerned with a case where there are 12 gas stations in a row and we are proposing to open the 13th. Instead, it may be the first gas station, the first motel or the first shopping center in the area.

It is not practical to limit the capitalization of hypothetical improvements approach to cases where there are no comparable sales. The difficulty is that one party will always come in with " comparable sales." For example, a sale of property across the street from the subject property will be presented as a comparable sale. But the area across the street may be one-half the area of the subject property and a motel could not be built on that property although a motel could be constructed on the subject property. Moreover, there may be one type of zoning on one half of the street and not on the other, or there may be a probability of rezoning or there may be a building existing on "comparable property" that may increase or decrease the value of the land. In the case of residential sales, comparable sales are something that can be discussed intelligently. But in the case of commercial property it is difficult and unrealistic to base valuations merely on sales of "comparable property."

A representative of the Highway Department made a statement. The substance of his statement may be summarized as follows:

Capitalization is only one of the three approaches to value: (1) comparable sales, (2) reproduction and replacement and (3) capitalization. The capitalization approach is, at best, very uncertain and unreliable. Changing the capitalization rate by one point may make a difference of thousands of dollars in the capitalized value.

Capitalization of rental property having existing improvements is speculative enough, but when the appraiser is permitted to construct a castle in the air -- a structure

not even built -- and consider all the things that go into getting a net rental income to capitalize, you are getting into the worst type of speculation in the world. It is well enough to state that this is considered in the market. But here we are considering the trial of a case before the jury. We are trying to come out with a fair compensation for the property owner and it is going to be too confusing and misleading to the jury to try to determine that compensation if this type of evidence is used. It is hard enough as it is when other evidence, such as comparable sales, is used. But when you speculate on nonexistent income from buildings not in existence, the jury will be confused, the trial will be lengthened, and the verdict is less likely to be a just verdict of compensation for the property owner and the condemning agency.

Moreover, this is not useful evidence; it is not reliable and probative evidence as to the value of the property or the compensation -- it is the least reliable. There are so many other means of presenting and proving the fact of value without bringing in this incidental, speculative evidence that there is no justification for using evidence that is going to cause too much trouble for what you get out of it.

Limiting the capitalization of nonexisting improvements to cases where there are no comparable sales would not be of much help -- you can never agree on what is comparable and what is not comparable. This type of provision would present the issue on whether these are comparable sales or not. Where there are several different contentions as to highest and best use, you may have comparable sales on one use but not on another. For example, there might be comparable sales if residential use is the highest and best use but none if commercial use is the highest and best use. A court could never determine whether or not there were comparable sales.

It was pointed out that (1) the opinion of the expert is the thing upon which the verdict is based and the other evidence is merely in support of his opinion and, accordingly, is taken into account only in weighing the opinion of the expert who is giving an opinion based on this theory and (2) the other party is free to question the expert on cross

examination and see if he can shake him on what he thinks the building will cost, rate of occupancy and capitalization, etc.

The Commission discussed whether permitting the use of this approach would extend trials. But it was noted, that this approach cannot be used in every case, for under Senate Bill No. 205 this approach can be used only if a well informed buyer and seller would consider it in determining whether to buy and sell the property in the market. It was agreed that in some cases this approach would result in longer trials. But this is because the problem of property valuation is complex, not because this approach is not a valid one.

(6) Nature of improvements on and uses of property in the vicinity. The Commission approved subdivision (g) of Section 1248.2 which preserves the substance of the last sentence of existing Section 1845.5.

(7) Offers to purchase the condemned property. The Commission unanimously agreed to delete the provision of Section 1248.3 permitting an appraiser to consider offers to purchase the subject property in forming his opinion.

It was noted that the deleted provision was inserted in the bill by the Senate Judiciary Committee after extensive hearings on the bill. Attorneys who normally represent condemnees appeared before the Senate Judiciary Committee and advocated a much broader provision relating to offers. The provision inserted by the Committee was drafted by the Commission and is a provision that permits only a very limited number of offers to come in.

The staff expressed the opinion that the existing law permits an appraiser to consider an offer to buy the subject property in forming his opinion if the offer meets the conditions set out in Senate Bill No. 205.

The consultant suggested that the provision might be modified to exclude as a matter of law any offer made after the date of the resolution or the probability of the acquisition of the property by eminent domain. The consultant, however, still recommends that all offers be excluded for the reasons given in his research report.

A representative of the Department of Public Works objected to the provision permitting the property owner to introduce an offer to buy the subject property. He stated in substance:

> An offer is uncertain, unreliable, subject to fabrication and has very little probative effect compared to the damage it can do. An offer is the most inflammatory type of evidence; it can't be refuted and is almost impossible to deal with. Such evidence will confuse the jury.

(8) Reproduction or replacement approach. The Commission discussed Section 1248.2(f). It was noted that this provision permits the use of the reproduction or replacement approach when the improvements enhance the value of the property or property interest for its highest and best use.

The effect of this provision is to require that the land be valued for the use to which it is being put if the reproduction or replacement approach is used. For example, take a particular tract of land that is improved by a church and assume that the land itself would be worth $50,000 when used for church purposes but $100,000 when used for commercial purposes. Assume that the cost of replacement or reproduction of the church would be

$250,000. If the reproduction or replacement approach is used, the land and improvement would be worth $50,000 plus $250,000, or $300,000. In other words, the land is valued for its highest and best use, which is -- because the land is now improved by a church -- use for church purposes. On the other hand, using the comparable sales approach, the appraiser could value the land at $100,000 (as bare land) and add thereto the salvage value of the church ($150,000 on the estimate that it would cost $100,000 to move the church to a new site) giving a total value of $250,000. Thus, the "highest and best use" provision is intended to prevent the valuing of the land as bare land at its value for commercial purposes ($100,000) and then adding the replacement or reproduction value of the church ($250,000).

(9) Consideration of taxes in determining reasonable net rental value. The Commission approved the amendment to Section 1248.3(d) which makes it clear that taxes, as distinguished from assessed valuation, can be considered in determining reasonable net rental value.

(10) Apportioning sales price of comparable sale between land and improvements. The Commission disapproved the amendment made to subdivision (e) of Section 1248.3 which provides that an appraiser can apportion the price of a particular comparable sale between land and improvements for the purpose of comparison with the property to be taken, damaged or benefited. Subdivision (e) states the general rule that a witness may not testify to his opinion as to the value of comparable property. The justification for this provision is that the issue is the value of the subject property, not the value of other properties.

When there is allowed a break down of a comparable sale between land and improvements, it permits the appraiser to express an opinion as to either the value of the land or the value of the improvements. It would create problems in court. One witness would say the land is worth so much and the improvement so much; another witness would just reverse the figures. In effect, you are trying to prove the value, for example, of a piece of bare land by comparing it to a piece of improved property. It may take considerable time in court to break down the improved property between land and improvements and the estimates of the value of each would be based on speculation.

The Commission's report on Senate Bill No. 205 to the 1963 Legislature is to state that the elimination of this amendment will not prevent a witness, in discussing comparability, from stating whether or not the improvement is comparable and what the differences between the improvements on the subject and comparable properties are.

(11) Permitting cross examination of a witness upon whose opinion a witness for an adverse party based his opinion. The Commission added the following new section to Senate Bill No. 205:

> SEC. 5. Section 1248.6 is added to the Code of Civil Procedure to read:
>
> 1248.6. If a witness testifies to his opinion of the value of the property or property interest to be taken, damaged or benefited and testifies that such opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called as a witness by the adverse party and examined as if under cross-examination concerning the subject matter of his opinion or statement.

This new section would, for example, permit the plaintiff to call an oil expert and cross-examine him regarding oil deposits on the subject property where an appraiser for the defendant had based his opinion as to the value of the subject property upon the opinion of the oil expert.

Senate Bill No. 203

The Commission considered Memorandum No. 27(1961) relating to Senate Bill No. 203 (moving expenses). The Commission approved Senate Bill No. 203 as amended in the Senate April 18, 1961.

Study No. 52 - Sovereign Immunity

Special state bar committee. The Commission authorized and directed the Chairman to write to the President of the State Bar suggesting that a special committee of the State Bar be appointed to work with the Commission on the Study on Sovereign Immunity. It was suggested that the staff submit a rough draft of such a letter to the Chairman for his consideration.

Cooperation with other groups. Commissioner McDonough reported that Mr. Charles Johnson of the Governor's office had commented on the importance of this study and had suggested that it would be advisable to work closely with the League of California Cities and the County Supervisors Association and that the Commission might want to check with Mr. McCarthy in the Controller's office on various aspects of the study. The Executive Secretary reported that the Attorney General's office had indicated that it would like to have a representative present at Commission meetings when this study is considered. It was agreed that it would be desirable to have representatives of these groups present at Commission meetings as observers and that cooperation with these groups would be desirable and necessary.

Additional compensation for consultant. The Commission considered the amount of compensation that should be paid to the research consultant on this study. It was agreed that the compensation should be increased by an additional $3,500. The Executive Secretary was directed to discuss the matter with Professor Van Alstyne and to prepare the necessary agreement to effectuate this decision. If the Department of Finance has no objections to this procedure, the Commission indicated that it would be inclined to approve such an agreement when it is later presented to the Commission for its approval.